

CHAPTER 8: COMPETITIVE DISCUSSIONS

Learning Objectives

At the end of this chapter you will be able to:

Primary Learning Objective (PLO)

Conduct competitive discussions.

Classroom Learning Objective 8/1

Describe fundamental differences between the bargaining environments in competitive and sole source procurements.

Classroom Learning Objective 8/2

Identify the distinguishing characteristics of the competitive discussions process.

Classroom Learning Objective 8/3

Identify the steps in conducting competitive discussion process.

Classroom Learning Objective 8/4

Apply the special rules for competitive discussions.

Contents and Procedures

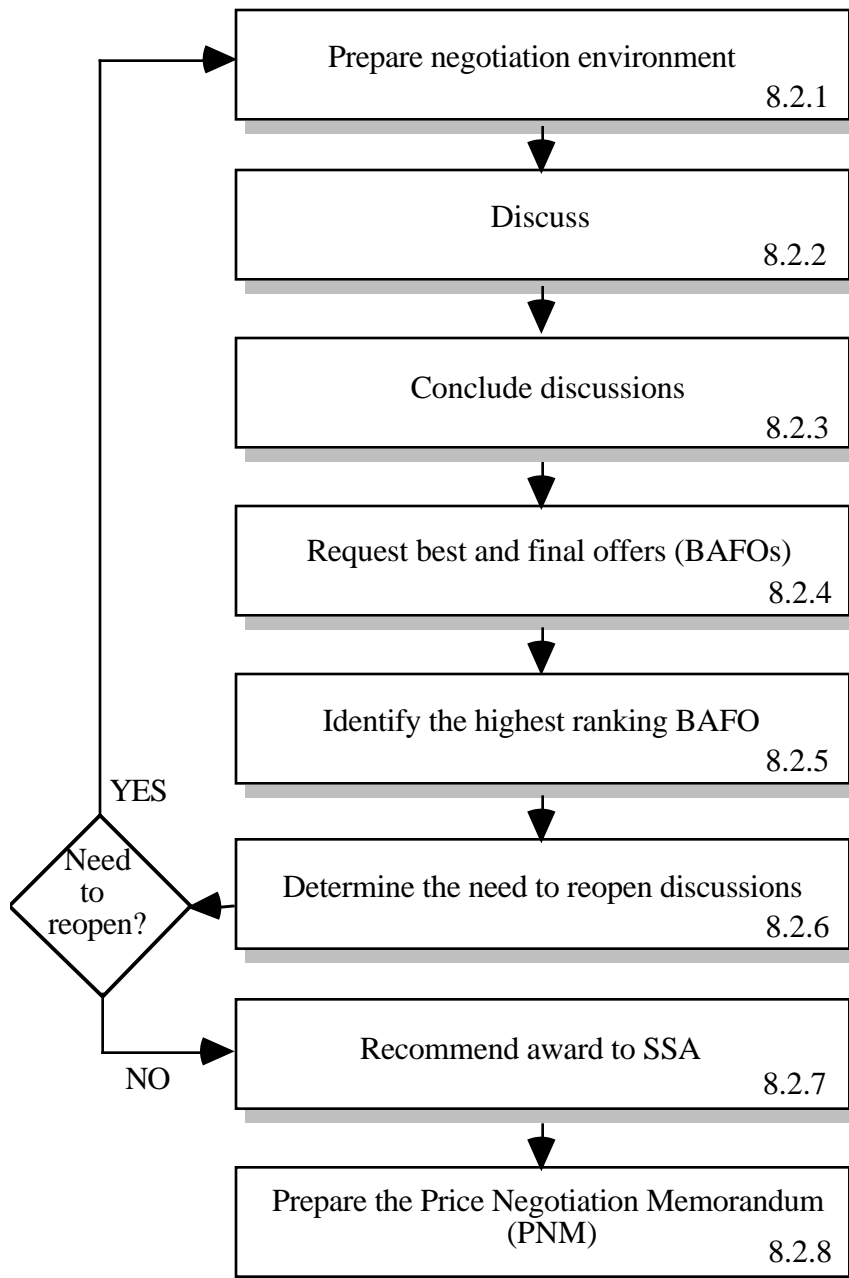
Chapter Contents

In this chapter you will learn:

| Section | Title | See Page |
|---------|---|-------------|
| 8.0 | Introduction | 116 |
| | "Meaningful Discussions" | 116 |
| | Competitive Discussion Defined | 116 |
| | Overall Purpose of Competitive Discussions | 116 |
| 8.1 | Describe the Fundamental Differences Between the Bargaining Environments of Competitive and Sole Source Procurements | 117 |
| | Increased Bargaining Power | 117 |
| | Unreasonably Low Priced Proposals | 117 |
| | Unfavorable Aspects | 117 |
| 8.2 | Identify the Distinguishing Characteristics of the Competitive Discussions | 118 |
| | Evaluation Factors | 118 |
| | Competitive Range | 118 |
| | Desired Outcome | 118 |
| | Possible Outcomes | 119 |
| 8.3 | Identify the Steps in Conducting Competitive Discussion Process | 120 |
| | Safeguard Confidential Information | 120 |
| | Brief Government Team | 120 |
| | Conduct Discussions | 120 |
| | Evaluate BAFOs and Debrief | 120 |
| 8.4 | Apply the Special Rules for Competitive Discussions | 121 |
| | The Concept of "Meaningful Discussions" | 121 |
| | Disclosure of Deficiencies | 121 |
| | What You Cannot Do | 122 |
| | What You Must Do | 122 |
| | What You Can Do | 123 |
| 8.5 | Summary | 124 |

Procedures

The following flowchart shows the steps in competitive negotiation:



8.0 Introduction

"Meaningful Discussions"

Competitive discussions enhance competition by allowing negotiations with multiple offerors who submit differing proposals. Before selecting the winning source or contractor, the government can hold "meaningful discussions" with those offerors falling within a competitive range. This process, known as the "conduct of meaningful discussions," allows the government side to bring out proposal weaknesses and deficiencies so offerors can make improvements before submitting a best and final offer (BAFO).

Competitive Discussion Defined

FAR 15.601

The FAR defines "discussion" as including any oral or written communication between the government and an offeror, other than communications only for the purpose of minor clarification. All discussions are accomplished in private communication between each offeror and the government that:

- Involve information essential for determining the acceptability of a proposal or
- Provide the offeror an opportunity to revise or modify its proposal.

Although competitive discussions are more restrictive than typical sole source negotiations in that certain information cannot be disclosed, the "discussions" addressed in this chapter are a form of contract negotiations used when the government bargains with more than one contractor.

Overall Purpose of Competitive Discussions

Since each proposal offers distinct supplies or services, discussions are needed to determine which proposal will best fill the government requirement.

8.1 Describe the Fundamental Differences Between the Bargaining Environments of Competitive and Sole Source Procurements

Increased Bargaining Power

The primary difference in the bargaining environment of competitive discussions compared to sole source negotiations is the greater bargaining power possessed by the government side. In sole source negotiations, the contractor side has the bargaining advantage because the government needs the unique deliverable provided by the single source. In competitive discussions, this bargaining power is heavily on the government side by virtue of the competition between offerors.

Unreasonably Low Priced Proposals

FAR 15.605(d)

Since the bargaining power more decidedly favors the government, offerors are sometimes tempted to submit unrealistically low prices to win contract award. This is especially true in competitions for cost-type contracts (see FAR 15.605(d)). Under cost plus fixed fee contracts, there is essentially no penalty for underestimating costs since the contractor is reimbursed for all allowable costs. For fixed price contracts, "buy-in" contractors may try to recoup their losses with high-priced modifications or less than satisfactory output. **In short, the government side should always be alert for extremely low price proposals that are unlikely to satisfy the requirements of the contract.**

Unfavorable Aspects

The favorable bargaining power also tempts the government side to exploit the situation with win/lose tactics, such as auctioning and technical leveling. These tactics are often used in negotiations outside the government where a firm negotiates the best deal and then tells competitors to submit even lower prices. Because of the enhanced bargaining position and resulting temptation, the FAR established special rules to observe during competitive discussions which are not applicable to sole source negotiations.

Finally, the increased competition inherent in competitive discussion sometimes tempts offerors to use unsavory methods to win the contract. These negative ramifications include temptations to illicitly obtain information on competing proposals. Some offerors may also be tempted to collude with other offerors to eliminate the effect of the competition.

8.2 Identify the Distinguishing Characteristics of the Competitive Discussions

Evaluation Factors

FAR 15.605(b)

In competitive discussions contract price is often less important than other evaluation criteria. Total contract cost is generally only one of several factors used in the Request for Proposal (RFP) to determine the best source. The non-price evaluation factors used to select the best source include:

- Technical Evaluation

The technical evaluation of the proposals is generally conducted by specialists in the area, such as scientific and engineering personnel. This written evaluation includes a narrative on the technical strengths and weaknesses of each proposal and explains determinations of unacceptability.

- Business and Management Evaluation

Management capabilities are appraised using the following factors:

- Management organization
- Availability of required facilities
- Cost controls
- Ability to maintain and account for government furnished property
- Offeror willingness to devote resources to the proposed work

- Past Performance

- Government experience with the offeror
- Private sector experience with the offeror
- History of meeting delivery schedules.
- Other pertinent administrative and business information that may have been requested in the solicitation

Competitive Range

A competitive range is established once all proposals have been rated according to the evaluation criteria stated in the RFP. The competitive range shall include all proposals which have a reasonable chance for award once discussions are held. This determination is extremely important because the government must hold discussions with all offerors falling within the competitive range.

Desired Outcome

In contrast to noncompetitive negotiations where mutual agreement is the desired conclusion, competitive discussions do not end in a deal. Instead, offerors are only encouraged to submit their best and final offers (BAFOs). The government side then evaluates the competing BAFOs and selects the successful proposal after considering all the evaluation factors.

Possible Outcomes

Instead of attempting to reach mutual agreement and finalize a deal, the primary goal of the government in competitive discussions is to

***persuade* each offeror to submit a BAFO that represents an improvement over the earlier proposal.** The government hopes any revisions will more likely satisfy the government requirements of the proposal and be closer in price to what the government sidebelieves is fair and reasonable.

However, offerors are free to remove themselves from consideration, make no changes at all in their BAFO, or make changes that have no relationship whatsoever to the discussions. On the other hand, there is nothing to prevent the government from obtaining informal agreement on contract terms and conditions with the expectation that the BAFO will reflect the results of the discussion.

8.3 Identify the Steps in Conducting Competitive Discussion Process

Safeguard Confidential Information

The physical environment for competitive discussions is essentially the same as the environment for sole source negotiations with the major exception of increased security considerations. While it is always wise to safeguard confidential information, this practice is imperative when holding competitive discussions. By safeguarding information the government can ensure that offerors do not get an unfair advantage by having access to unauthorized information, such as other proposals or confidential government evaluations. Meetings should also be scheduled in ways to avoid inappropriate contact between competing offerors.

Brief Government Team

FAR 3.104
FAR 15.610

Government negotiators should be careful to set the proper tone when entering into competitive negotiations. Immediately prior to the discussions, the chief negotiator should brief the team on the unique nature of the upcoming negotiations. Besides refreshing the team on the protocol discussed in Chapter 4, the briefing should spell out the differences between competitive discussions and other forms of negotiations. **In particular, the government team should be reminded that they may not disclose information that could lead to technical leveling, technical transfusion, or auctioning.** (These differences will be discussed in greater detail later in this chapter.)

Conduct Discussions

The content and extent of discussions with each offeror will be determined by the individual characteristics of each proposal. The contracting officer is required to:

- Attempt to resolve uncertainties concerning the technical aspects or other terms of the proposal. However, suspected mistakes should be identified without revealing information about another proposal.
 - Advise each offeror of proposal deficiencies, to provide them with an opportunity to satisfy the government requirements.
 - At the conclusion of the discussions, give all offerors still within the competitive range the opportunity to submit a BAFO by providing them a common cut-off date for revising their proposals.
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Evaluate BAFOs and Debrief

FAR 15.611

Once BAFOs are received, final step in the competitive discussion process is the evaluation of all BAFOs to determine which offeror to recommend to the source selection authority (SSA). The SSA then has the ultimate authority to decide on which proposal will win the contract. Following notice of award, the losing offerors may request a debriefing on why the winning proposal was selected.

8.4 Apply the Special Rules for Competitive Discussions

The Concept of "Meaningful Discussions"

Before entering into competitive discussions, the government side should develop separate negotiation positions for each proposal. How you persuade an offeror to improve a proposal is different than in noncompetitive negotiations because of the Comptroller General (GAO) requirement that discussions be "meaningful". To conduct meaningful discussions, the government side must disclose deficiencies, uncertainties, or mistakes, and provide an opportunity for the offeror to revise the proposal. In the true win/win spirit, the government side may also want to acknowledge some of the positive aspects of a proposal.

Remember, all offerors with whom you hold discussions must be provided an opportunity to submit a "best and final offer" but it is up to each offeror to determine if and how the offer should be modified.

Disclosure of Deficiencies

A deficiency is any part of a proposal that fails to satisfy the government requirements. Deficiencies should be derived only from the evaluation of each proposal against the specific evaluation criteria or the minimum requirements in the solicitation. **In no event are deficiencies to be derived from a comparative evaluation of the relative strengths and weaknesses of different proposals.** Deficiencies include such matters as:

- Unrealistic cost estimates,
- Failures to meet specifications,
- Failures to submit required information, or
- Questionable technical or management approaches.

Some guidelines follow:

- The content and extent of discussion is a matter of the contracting officer's judgment based on the particular facts of the procurement. In this regard, treat discussions with each offeror as a sole source negotiation on the merits of that offeror's proposal.
 - You are under no obligation to discuss every aspect of the proposal. Instead, you are required only to reasonably lead offerors into those areas of their proposals considered deficient within the context of the procurement.
 - Government must be as specific as possible in its communication. An offeror should not be left with the impression that there are no remaining deficient areas when deficiencies still exist.
 - Discussions with an offeror should be confined only to a specific proposal and its related deficiencies. Do not engage in technical transference by avoiding the disclosure of the strengths and weaknesses of competing offerors, or revealing technical information, ideas, or cost data from another proposal.
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What You Cannot Do

In competitive discussions, you cannot:

FAR 15.610(e) • Use auction techniques, such as:

- Indicating to an offeror a cost or price that it must meet to obtain further consideration,
 - Advising an offeror of its price standing relative to another offeror (however, it is permissible to inform an offeror that its price is considered by the government to be too high or unrealistic), and
 - Otherwise furnishing information about other offeror's prices.
- Engage in technical transfusion — disclosing technical information provided by one offeror to another offeror, resulting in improvements to the second offeror's proposal.
 - Engage in technical leveling—helping an offeror to bring its proposal up to the level of other proposals by repeatedly pointing out or explaining technical weaknesses.
 - Otherwise tell one offeror about the proposals of other competitors since such action would give an unfair advantage to some firms and would invite protests.
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What You Must Do In competitive discussions, you must:

FAR 15.610(b) • Treat all offerors the same.

- Attempt to resolve any uncertainties concerning the technical proposal and other terms and conditions of the proposal, especially those that would have an impact on price.
 - Advise the offeror of reasons for believing that the price is unreasonably high based on data from the offeror or comparisons with historical prices, commercial prices, and other estimates (but not the price proposed by other offerors).
 - Identify suspected pricing mistakes by bringing them to the offeror's attention as specifically as possible without disclosing information on prices or evaluations of other proposals. This is especially important when the proposed price appears to be a "buy-in" and is so far below your minimum position as to not be considered fair and reasonable.
 - Provide the offeror a reasonable opportunity to submit any pricing, technical, or other revisions to its proposal that may result from the discussions.
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What You Can Do In competitive discussions, you can also:

- Point out any proposal variation from the RFP that you believe is unnecessary and may have affected the proposed price.
 - Discuss potential tradeoffs between price and other contract terms.
 - Point to indicators that the proposed price is too high, such as the producer price index, historical or commercial prices, and cost estimating relationships.
 - Ask the offeror to "sharpen its pencils" or otherwise urge the offeror to improve on price in the BAFO – especially when coupled with a persuasive presentation of facts and reasoning supporting your contention that the offeror could do better on price.
 - Present a position on price and the rationale for that price. The Comptroller General¹ ruled that contracting officers can:
 - Develop a separate negotiation price objective for each proposal based on a separate appraisal of that proposal
 - Disclose that objective to the offeror as a negotiation tool for reaching an agreement as to a fair and reasonable price.
 - Obtain informal agreement on terms and conditions with the expectation that the BAFO will reflect the results of the discussion.
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¹In the matter of Racal Guardata, Inc. (B-245139.2, February 7, 1992), the contracting officer asked one offeror to reduce its price by 10 percent and another by 30 percent. The Comptroller General did not consider this to be "a prohibited auction" since the Government's price objective for each offeror was based on a comparison of the proposed price with catalog prices and prior contract prices – not with other offered prices.

8.5 Summary

Summary

Competitive discussions is a form of negotiation where the government conducts discussions with multiple offerors who submit differing proposals. In this type of negotiation, price is often less important than the technical evaluation and other criteria. Instead of attempting to reach mutual agreement, the desired outcome of competitive discussions is to persuade each offeror to submit a BAFO that represents an improvement of their earlier proposal.

Because of the increased bargaining power resulting from the competitive nature of this form of negotiation, the government side is bound by special rules. In particular, the government side is prohibited from engaging in auction techniques, technical leveling, technical transfusion, or otherwise telling one offeror about competitive proposals. In short, the government is required to treat all offerors fairly and equally.
